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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91237315
Party	Plaintiff American Marriage Ministries
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

AMERICAN MARRIAGE MINISTRIES,	)	
	)	
Opposer,	)	Opposition No. 91237315
v.	)	
	)	<b>OPPOSER’S OPPOSITION TO</b>
UNIVERSAL LIFE CHURCH	)	<b>APPLICANT’S MOTION TO STRIKE</b>
MONASTERY STOREHOUSE, INC.	)	
	)	
Applicant.	)	
_____	)	

Applicant’s Motion to Strike or Disregard New Material Submitted in Reply continues its pattern of attempting to avoid, and at the very least delaying, any rulings on the merits of this case. The Board should deny the Motion to Strike, as the evidence and argument submitted to the Board by AMM may properly be considered by the Board at this time. Notably, Applicant does not dispute the factual content or statements in AMM’s reply brief; Applicant only asks the Board to not consider them at this stage. Even if Applicant were correct about the initial admissibility issues for the underlying evidence (which Applicant is not), those issues were cured by AMM’s response to Applicant’s objections. Thus, all of those documents and issues are, at the very least, admissible and relevant during any trial phase. Therefore, Applicant’s argument amounts to nothing more than a request for continued delay and continued increase in costs.

The instant motion is not Applicant’s first effort to avoid AMM’s arguments and evidence. In response to AMM’s motion for partial summary judgment (Dkt. 21), Applicant initially sought to delay by reopening discovery. (Dkt. 24). When the Board rejected that request, Applicant, in its opposition to AMM’s dispositive motion (Dkt. 30), raised for the first time a number of evidentiary objections to the evidence submitted by AMM. AMM, in its reply (Dkt. 32), responded to Applicant’s evidentiary objections by providing or identifying in the record

information sufficient to overcome the objections. Instead of even attempting to respond to the facts contained in the original documents, Applicant seeks to strike information offered purely to overcome evidentiary objections. Applicant's motion to strike, filed well over a month after briefing on AMM's Motion for Partial Summary Judgment concluded, serves only to prolong these proceedings. *See First Horizon Corp. v. Colwell*, Opposition No. 91158548, 2004 WL 1950711, at \*2 (Aug. 27, 2004) (noting that "the Board disfavors motions to strike . . . because they are unnecessary" (citing TBMP § 517 ("[A]ny portions of the brief that are found by the Board to be improper will be disregarded."))).

### **I. AMM'S EVIDENCE IS ADMISSIBLE AND NOT "NEW"**

Applicant's motion to strike falsely characterizes the documents submitted with AMM's reply as "new evidence," disregarding the fact that the documents are substantively identical to the documents already submitted as evidence in support of AMM's motion for partial summary judgment. *Compare* Wall Declaration, Exhs. 1-5, 6a, 7-18 *to* Stephens Declaration, Exhs. D, F. The evidence submitted with AMM's reply merely addresses Applicant's evidentiary concerns, raised for the first time in Applicant's opposition brief, about the evidence AMM submitted with its motion. The evidence submitted with the reply brief therefore may be considered. *See Grupo Marti, S.A. v. Martis S.A.*, Cancellation No. 9204460, 2006 WL 896920, at \*2 n.3 (Apr. 4, 2006) (where a declaration and exhibits submitted with a reply brief are directed to statements made in the opposing brief, a motion to strike the evidence submitted with the reply brief is properly denied); *Club Amenities, LLC v. Pettenon Cosmetici SNC*, Cancellation No. 9204317, 2005 WL 7054527, at \*4 (Nov. 29, 2005) (Board did not err in considering rebuttal evidence submitted with reply brief where evidence was merely confirmatory and cumulative). For instance, as permitted by FRE 106, AMM supplemented excerpts of certain documents with complete versions in response to Applicant's completeness objection. AMM also responded to Applicant's

challenge, raised for the first time in its opposition brief, to the authenticity of some of the evidence AMM offered, both by pointing to information provided to Applicant during the course of discovery that demonstrated the authenticity of the evidence and by submitting a declaration re-authenticating the evidence to avoid any doubt regarding its admissibility. *See* Wall Declaration at ¶¶ 3-22; *id.* at ¶ 21, Exh. 19. AMM’s response to Applicant’s evidentiary concerns does not amount to the introduction of new evidence; instead, it responds directly to arguments raised for the first time by Applicant in its opposition brief.

Because the documents submitted with AMM’s reply were, for the most part,<sup>1</sup> substantively identical to the documents submitted with its motion, Applicant was not “depriv[ed] . . . of an opportunity to address the merits” of AMM’s evidence. *See* Motion to Strike at 2; Wall Declaration, Exhs. 1-5, 6a, 7-18; Stephens Declaration, Exhs. D, F. Applicant had ample notice of the substantive content of the evidence, all relevant parts of which were produced in discovery, attached to AMM’s motion, and expressly discussed in AMM’s motion. (Dkt. 21 (discussing the generic or merely descriptive uses of “get ordained” shown in the cited evidence)). Instead of properly responding to this evidence, Applicant spent its Opposition attempting to exclude it while mostly ignoring the substantive merits of the evidence. This was a strategic decision voluntarily made by Applicant.

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<sup>1</sup> Exhibit 6 is an exception. Exhibit 6a is identical to a page produced in discovery and attached to the Stephens Declaration, but Exhibit 6b is new. Exhibit 6b was submitted as a supplement to Exhibit 6a, as AMM was unable to find a complete copy of the excerpted webpage shown in Exhibit 6a. Exhibit 6b shows a complete version of a webpage addressing the same topic on the same website as the topic and website shown in Exhibit 6a.

Exhibit 19 and 20 to the Wall Declaration are new to the reply brief, but may nonetheless be considered by the Board because they respond to arguments raised in Applicant’s opposition brief, rather than being used as direct evidence in support of AMM’s motion for partial summary judgment.

Striking AMM's evidence of admissibility in its Reply Brief would also only serve to unnecessarily delay resolution of the matters before the Board. If the Board declined to consider the evidence at this stage, notwithstanding the proof of admissibility AMM provided in its reply, the Board would need to consider the evidence again during the trial period. Postponing consideration of this evidence until the trial period would cause the parties and the Board to incur additional costs in time and resources to litigate an issue that should be decided now.

## **II. APPLICANT NEVER PLED SECONDARY MEANING**

As with Applicant's effort to strike AMM's evidence submitted in response to Applicant's arguments, Applicant's objection to AMM's argument that Applicant is foreclosed from arguing secondary meaning rings hollow. Applicant does not dispute that it never pled secondary meaning (because clearly it did not) and never sought to amend its pleadings to allege secondary meaning as a basis for acquiring distinctiveness (again because clearly it did not). Applicant provides no authority that would support raising an issue that was not pled after discovery closed.

Applicant confusingly attempts to blame AMM for only raising an issue in Reply that it had no reason to raise before and says AMM opened the door for this issue.<sup>2</sup> AMM had no reason to believe it needed to point out to Applicant that Applicant did not plead secondary meaning. AMM presumed that Applicant knew the content of its own pleadings and knew that at no time in the over two years of this case's pendency did Applicant plead, or even attempt to plead secondary meaning. AMM's reply brief simply permissibly responded to Applicant's

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<sup>2</sup> AMM did acknowledge in its Motion that a mark may become protectable if an applicant can demonstrate the mark acquired secondary meaning. AMM only did so in the context of stating that it was not an issue in this case, because it was, and is, not an issue in this case given that Applicant never pled, or put AMM on notice that it wanted to plead, secondary meaning during any portion of discovery.

improper attempt in its opposition brief to ambush AMM with new claims of secondary meaning when it had not pled secondary meaning.

### **III. CONCLUSION**

Applicant's motion to strike asks the Board to avoid, for now, the arguments and evidence presented by AMM that Applicant finds inconvenient. There is no basis for the Board to postpone consideration of these issues and evidence. The Board may, consistent with the Federal Rules and Board practice and precedent, consider all the evidence and arguments in AMM's Motion for Partial Summary Judgment and the Reply in Support.

Dated: January 15, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 15, 2020, I served the foregoing Opposer's Opposition to Applicant's Motion to Strike by emailing to Applicant as follows:

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